IN THE

Supreme Court of the United States

October Term, 1977

No. 77-689

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner,

v.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA, and
TOWN OF AVILLA, INDIANA,
municipal corporations,
Respondents.

PETITIONER'S REPLY BRIEF

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December 28, 1977

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PETITIONER'S REPLY BRIEF

Petitioner Indiana & Michigan Electric Company files this Reply Brief in support of its Petition that a Writ of *Certiorari* issue to the United States Court of Appeals for the Seventh Circuit to review its order and judgment (Appendix at 6a[1]) and its opinion (7a), both issued August 16, 1977.

1. Citations with the suffix "a" are to the Appendix to Indiana & Michigan Electric Company's Petition filed on November 14, 1977.

The Brief in Opposition filed by Respondents and the Brief *Amicus Curiae* filed in opposition by certain Illinois municipalities erroneously rely on *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973), to support their opposition to the grant of the Petition herein sought.

In addition, nine of the Respondents have just filed a further civil antitrust action in the same Indiana federal district court from which the instant case emanates. That new civil antitrust action is but an effort to accomplish a further extension of the decision below in that the relief sought, in addition to trebled damages, is a permanent injunction restraining Indiana & Michigan Electric Company and the other named defendants "during the pendency of this action from putting into effect and charging the plaintiff a new, higher wholesale price for bulk power which requires the plaintiffs to pay more than the rates then in effect to [Indiana & Michigan Electric Company's] retail industrial customers."

I

Respondents, joined by the Illinois *amicus curiae,* have placed unwarranted reliance on this Court's decision in *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973).

The *Otter Tail* decision states in part:

> "There is nothing in the legislative history [of the Federal Power Act] which reveals a purpose to insulate electric power companies from the operation of the antitrust laws. To the contrary, the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest." (410 U.S. at 373-374).

While we do not quarrel with that statement it must, however, be read in the context in which it was made, namely, a discussion of the legislative history of the Federal Power Act which on the one hand resulted in the inclusion of Section 202(b) (dealing with the authority of the Federal Power Commission [now Federal Energy Regulatory Commission] to compel involuntary interconnections of power) and which, on the other hand, eliminated from the Act the authority which would have allowed the Federal Power Commission to order the "wheeling"[2] of electric power and energy. (410 U.S. at 373-374).

It is this recognition of the true import of the Court's *Otter Tail* decision that reinforces the need for granting the Petition here, and that need is not adversely affected by the Court's recent denial of the Petition in *American Telephone and Telegraph Company, et al.* v. *United States,* Docket No. 77-372.[3] The Petition there sought virtually a blanket exemption from the operation of the antitrust laws; Indiana & Michigan Electric Company's Petition acknowledges those areas in which the Court has recognized the existence of federal district court antitrust jurisdiction, but argues that such jurisdiction does not extend to matters so central to the regulatory schemes of both the federal and state util-

2. "Wheeling is where A, which has excess generating capacity, seeks to transmit power to its customer C with whom it has no transmission connection, by using the transmission facilities of B, which has connections with both A and C." *Florida Power Corporation* v. *FPC,* 425 F.2d 1196 at 1202, n.17 (5th Cir. 1970).

3. Certiorari denied, November 28, 1977.

ity commissions as the rates charged by a utility for sales at wholesale (now committed to the jurisdiction of the Federal Energy Regulatory Commission) and its retail rates (committed as they are to the jurisdiction of the appropriate state commission).

This Court, in concluding its discussion under Part I of its *Otter Tail* decision, stated:

> "Thus, there is no basis for concluding that the limited authority of the Federal Power Commission to order interconnections [under Section 202(b) of the Act] was intended to be a substitute for, or to immunize Otter Tail from, antitrust regulation *for refusing to deal* with municipal corporations." (410 U.S. at 374-375) (emphasis supplied).

Part I of the Court's decision in *Otter Tail* should not be read expansively nor as going beyond its express holding that the absence of authority to order the wheeling of electric power in the Federal Power Act created a "gap" in the regulatory scheme committed to the jurisdiction of the Federal Power Commission, and that void, therefore, prevented the application of the doctrine of implied repeal for which we contend in the instant Petition.

Part II of the *Otter Tail* opinion contains this Court's analysis of the district court's decree enjoining Otter Tail from refusing to sell electric power at wholesale and from refusing to wheel electric power over its transmission lines. This Court particularly noted that the decree also provided:

> "The defendant shall not be compelled by the Judgment in this case to furnish wholesale electric service or wheeling service to a municipality *except at rates which are compensatory and under terms and conditions which are filed with and subject to approval by the Federal Power Commission.*" (410 U.S. at 375) (emphasis supplied).

In reviewing that facet of the district court's decree, the Court clearly indicated again that the Federal Power Commission had no authority to order the wheeling of electric power and concluded therefore that:

> "Insofar as the District Court ordered wheeling to correct anticompetitive and monopolistic practices of Otter Tail, there is no conflict with the authority of the Federal Power Commission." (410 U.S. at 376).

This Court then considered that portion of the district court's decree which ordered interconnections between Otter Tail and the municipalities which had protested the activities of Otter Tail. Once again, the Court noted that since the Federal Power Commission had itself ordered an interconnection between Otter Tail and Elbow Lake, the district court's decree "presents no actual conflict between the federal judicial decree and an order of the Federal Power Commission." (410 U.S. at 376). This Court then addressed the potential of future conflict with respect to the retention by the district court of jurisdiction to carry out its decree and concluded its discussion by stating:

> "It will be time enough to consider whether the antitrust remedy may override the power of the Commission under §202(b) as, if, and when the Commission denies the interconnection and the District Court nevertheless undertakes to direct it. At present, there is only a potential conflict, not a present concrete case or controversy concerning it." (410 U.S. at 377).

Finally, in Part V of its *Otter Tail* decision, the Court discussed Otter Tail's claim that its actions were under-

taken in its own self-interest. In affirming the rejection of that argument, the Court cited its decision in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), and particularly its statement that:

> "The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct." (410 U.S. at 380, citing *Arnold, Schwinn & Co.*, 388 U.S. at 375.)

The Court clearly recognized that the district court in retaining jurisdiction over the parties "presumably will give effect to the policies embodied in the Federal Power Act . . ." (410 U.S. at 382). That is a clear statement of the interrelationship which exists between a federal district court and the Commission and of the great potential for conflict between them, the main point of the present Petition. Moreover, in its recent decision in *Continental T.V., Inc., et al.* v. *GTE Sylvania, Incorporated*, —— U.S. ——, 97 S.Ct. 2549 (1977), this Court overruled the *per se* rule announced in *Schwinn* and returned "to the rule of reason that governed vertical restrictions prior to *Schwinn*" (97 S.Ct. at 2562).

Clearly, the application of "the rule of reason" to the circumstances of this case should result in the insulation of Indiana & Michigan Electric Company from antitrust liability with respect to the rates which it charges to its wholesale and to its retail customers. Those rates are the product of the action of federal and state regulatory agencies to whose rate setting jurisdiction Indiana & Michigan Electric Company is subject. It has been established for over half a century that the actions of a state regulatory commission in "[t]he prescribing of rates is a legislative

act. The [state] commission is an instrumentality of the State, exercising delegated powers. Its order is of the same force as would be a like enactment by the legislature." *Bluefield Water Works & Improvement Company* v. *Pub. Serv. Comm. of the State of West Virginia*, 262 U.S. 679, 683 (1923).

Reliance by Respondents and by *amicus curiae* who support Respondents on a reading of *Otter Tail* which extends it unduly may properly be deemed questionable also in light of the fact that in both *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), and *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975), an implied repeal of the antitrust laws in a regulated industry was found to exist and that the opinions in those cases were written by the two Justices who did not participate in *Otter Tail*.

II

Nine of the respondents have instituted a new antitrust action in which they seek to enjoin rate filings by, among others, Indiana & Michigan Electric Company.

We have argued in the Petition that the opinion below would inevitably lead to encouragement of attacks upon the rate structures of electric utilities and to attempts by district courts to assume jurisdiction over such attacks rather than leaving them for determination by the appropriate forum, the Federal Power Commission (now Federal Energy Regulation Commission) and the appropriate state utility commission.

Our prediction has now been fully borne out by the new civil antitrust action instituted by nine of the Respondents herein on December 13, 1977, while this Petition was pending. That action, instituted in the same federal district court from which this proceeding emanates, seeks not only trebled damages but injunctive relief which would bar Indiana & Michigan Electric Company and the other named defendants, during the pendency of that action, from resorting to the proper regulatory jurisdiction by making certain filings with the Federal Energy Regulatory Commission.[4]

The decision below has thus become a vehicle for frustrating the normal channels of regulation by transfering the regulatory process to a federal district court. Before the effects of such a transfer become utterly unmanageable, on a nation-wide basis, this Court should review the decision below and return regulation to the administrative agencies which have the expertise to set at just and reasonable levels electric utility rates, a function which is central to their existence. Federal district courts are already sufficiently, if not overwhelmingly, burdened without there being added to their case loads the inevitable spate of lawsuits which the decision below will necessarily generate. Congress has shown no disposition to add public utility rate regulation to the new fields for district court jurisdiction.

4. The Complaint is filed in Civil Action No. S 77-0209 and is reproduced in the Appendix to this Reply. Attention is called particularly to paragraph numbered "4" in the prayer for relief appearing at page A8.

Conclusion

Indiana & Michigan Electric Company submits that the events which led to the filing of its Petition and those which have occurred since fully confirm the need for the grant of the Petition for a Writ of *Certiorari* in this case, before the federal district courts are inundated with civil antitrust actions for which there is no jurisdictional basis. Grave damage to the public interest, to an orderly system of regulation and to the other work of the district courts would all have been done before conflicts between the Circuits could be expected to develop.

Respectfully submitted,

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December 28, 1977

APPENDIX

Complaint

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Civil Action No. S77-0209

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA, and
TOWN OF NEW CARLISLE, INDIANA,
Municipal corporations,

Plaintiffs,

v.

AMERICAN ELECTRIC POWER COMPANY, INC.,
AMERICAN ELECTRIC POWER SERVICE CORPORATION, and
INDIANA & MICHIGAN ELECTRIC COMPANY,
Corporations,

Defendants.

Plaintiffs allege as follows:

I.

Jurisdiction and Venue

1. This is an action by nine municipalities that operate their own electric distribution systems against the compa-

nies that control their supply of wholesale electric power and also compete against them for retail sales. The plaintiff municipalities request relief against the defendant companies' monopolization of and attempt to monopolize the distribution and sale of electric power at retail within the area in which they do business, in violation of Section 2 of the Sherman Act, 15 U.S.C. §2. The plaintiffs request a declaratory judgment, preliminary and permanent injunctive relief, and treble damages.

2. This court has jurisdiction over this case by virtue of Sections 4 & 16 of the Clayton Act, 5 U.S.C. §§5, 26. The defendant companies transact business within the South Bend Division of the Northern District of Indiana.

II.

Parties

3. The plaintiffs, City of Mishawaka, Indiana; City of Niles, Michigan; City of Columbia City, Indiana; City of Bluffton, Indiana; City of Garrett, Indiana; City of Gas City, Indiana; Town of Frankton, Indiana; Town of Warren, Indiana; and Town of New Carlisle, Indiana, are municipal corporations located within the service area of the defendant Indiana & Michigan Electric Company ("I&M"). Each of the plaintiffs operates its own electric utility, through which it purchases bulk power at wholesale from the defendant Indiana & Michigan Electric Company and sells and distributes the electric power at retail to customers within its corporate limits and in nearby areas.

All of the plaintiff municipalities have been wholesale customers of the defendant Indiana & Michigan Electric Company for many years.

4. The defendant American Electric Power Company, Inc. ("AEP") is incorporated under the laws of the State of New York. AEP is a public utility holding company, which owns and controls the American Electric Power System, consisting of the defendant American Electric Power Service Corporation, the defendant Indiana & Michigan Electric Company, and other member companies that generate, transmit, and distribute electric power to customers in the States of Indiana, Michigan, Ohio, Kentucky, Tennessee, Virginia, and West Virginia.

5. The defendant American Electric Power Service Corporation ("AEP Service Corp.") is incorporated under the laws of the State of New York. AEP Service Corporation furnishes management, advisory, and other services to the defendant I&M and the other member companies of the AEP System. The defendant AEP Service Corporation and its employees participate in preparing and filing electric rates on behalf of the defendant I&M and in representing the interests of I&M in rate proceedings before state and Federal regulatory commissions.

6. The defendant Indiana & Michigan Electric Company is incorporated under the laws of the State of Indiana. The defendant I&M is a vertically integrated electric power company that generates electric power, transmits the power throughout its service area, and delivers

the power both to its wholesale customers, including the plaintiffs, and directly to its own retail industrial, commercial and residential customers. I&M's service area covers 7,740 square miles in southwestern Michigan and northern Indiana.

III.

Nature of Trade and Commerce

7. *Wholesale market.* The defendant I&M is the only firm engaged in the business of transmitting and selling bulk electric power at wholesale for ultimate distribution to customers in its service area. I&M is the plaintiff municipalities' only available outside source of supply for wholesale electric power. Plaintiffs Mishawaka, Indiana; Columbia City, Indiana; Garrett, Indiana; Gas City, Indiana; Frankton, Indiana; Warren, Indiana; and New Carlisle, Indiana, depend on the defendant I&M for all of their requirements of wholesale electric power for distribution and sale to their customers. Plaintiffs Niles, Michigan, and Bluffton, Indiana, which operate generation facilities, nevertheless depend on I&M for more than 95% of their requirements of electric power for distribution and sale to their retail customers.

8. *Retail market.* The defendant I&M also dominates and controls the sale of electric power at retail within its service area. I&M has more than 425,000 retail customers and sells more than 80% of the electric power sold at retail in its service area. I&M's wholesale customers, including the plaintiff municipalities, sell less than 20%. The plaintiff municipalities compete against the defendant I&M and the AEP System for sales of electric power at retail to industrial, commercial and residential customers.

9. The defendant I&M has increased its control of the retail market within its service area by acquiring municipal electric utilities. Since 1957 I&M has purchased or leased the assets of five of the 20 municipal utilities within its service area, has absorbed their retail distribution facilities into its retail distribution system, and has taken over all their industrial, commercial and residential customers, as follows: Kendallville, Indiana (1957); Decatur, Indiana (1959); Portland, Indiana (1963); Albion, Indiana (1966); and Fort Wayne, Indiana (1975). Fort Wayne is the largest city in I&M's service area. At the time of its takeover by I&M, Fort Wayne's municipal electric utility served 33,185 retail customers.

IV.

Violations of Law

10. The defendants have monopolized and have attempted to monopolize interstate trade and commerce in the distribution and sale of electric power at retail, in violation of Section 2 of the Sherman Act, as follows:

(a) Though at all times until 1973 the defendants, through Indiana & Michigan Electric Company, sold bulk electric power at wholesale to the plaintiff municipalities at or about the same price they charged I&M's retail industrial customers for bulk power, the defendants now require

the plaintiff municipalities to pay a substantially higher wholesale price for bulk electric power than the price they charge I&M's retail industrial customers. As a result the plaintiff municipalities have become financially unable to buy bulk power at the defendants' new wholesale price and to sell it to their own residential, commercial and industrial customers at prices competitive with I&M's retail industrial, commercial and residential prices;

(b) The defendants threaten to raise further the wholesale price they require the plaintiff municipalities to pay for bulk electric power, thereby increasing the amount they require the plaintiffs to pay in excess of the price the defendants charge I&M's retail industrial customers for bulk power.

11. The defendants' adoption of a new wholesale price to the plaintiff municipalities in excess of the prices at which they sell bulk electric power to I&M's retail industrial customers has caused and threatens to cause the following consequences:

(a) The defendants have impaired the plaintiffs' ability to compete against them for retail sales to residential, commercial and industrial customers, and

(b) By requiring the plaintiff municipalities to increase their retail prices to their own residential, commercial and industrial customers above the level of the defendants' lower retail prices, the defendants have caused the municipalities' customers to exert pressure on the municipalities to sell or lease their electric utilities to the defendant I&M so they can purchase electric power at the defendants' lower retail prices.

12. The acts and practices of the defendants alleged herein have been done with the intent, and have had the effect, of monopolizing part of the trade and commerce among the several states in the distribution and sale of electric power at retail to the injury of the plaintiff municipalities in their business and property in an amount exceeding $50,000,000 before trebling. The plaintiffs' losses are continuing.

13. Unless the relief requested by this Complaint is granted, the defendant companies will continue to violate 15 U.S.C. §2.

V.

Relief

WHEREFORE, plaintiffs pray as follows:

1. For a declaratory judgment that the defendants have violated 15 U.S.C. §2 by monopolizing and attempting to monopolize the distribution and sale of electric power at retail within the defendant I&M's service area.

2. For an order enjoining the defendant companies, their officers, agents, employees, successors and all persons in active concert or participation with them, from violating 15 U.S.C. §2.

3. For an order enjoining the defendants from creating or maintaining a disparity between the prices at which the defendant I&M sells bulk electric power by requiring the

plaintiff municipalities to pay a higher wholesale price for bulk power than the prices at which I&M sells and distributes bulk power to its retail industrial customers.

4. For an order restraining the defendants during the pendency of this action from putting into effect and charging the plaintiffs a new, higher wholesale price for bulk power which requires the plaintiffs to pay more than the rates then in effect to I&M's retail industrial customers.

5. For an order awarding the plaintiffs treble the amount of damages they have sustained as a result of the defendants' violations of 15 U.S.C. §2.

6. For an order awarding the plaintiffs reasonable attorneys' fees, together with the costs and disbursements of this action.

7. For such other and additional relief as the interests of justice may require.

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